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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

ALFONSO LOPEZ, JR.

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Petitioner. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

Clarendon Foundation is a non-profit, non-partisan legal and educational foundation concerned with contemporary issues related to the Constitution and democratic government, particularly in the areas of federalism, state's rights and the Commerce Clause. Because this case raises questions of significance to Commerce Clause jurisprudence, we believe that our perspective will complement the briefs of the parties and assist the Court in resolution of these issues.

SUMMARY OF ARGUMENT

Section 922(q) is a valid exercise of congressional power under the Commerce Clause. The predicate for the lower court's contrary ruling -- that the absence of express congressional findings concerning the nexus between the proscribed conduct and interstate commerce rendered the statute unconstitutional -- is invalid. Acts of Congress are presumed constitutional until a reviewing court determines that the supposition of an interstate nexus has no "rational basis." Congress' deliberations as reflected either in formal findings or in other traditional sources of legislative purpose or intent, although these may facilitate judicial review, have no bearing on the lawfulness of the legislative act. That determination is strictly a matter of how the legislation would conform to the product of a reasonable legislature which had addressed overtly the question of an interstate nexus.

In this case, the rational-basis analysis takes place within the context of a nationwide epidemic of handgun violence with distinct reverberations throughout interstate commerce. Thus, the possession of a firearm in proximity to a public school is reasonably related to "commerce among the States." Once that determination is made, the principle of legislative independence precludes any second-guessing by the courts.

ARGUMENT

I. THE ABSENCE OF EXPRESS CONGRESSIONAL FINDINGS DOES NOT JEOPARDIZE THE CONSTITUTIONALITY OF SECTION 922(q).

1. When a court assesses the constitutionality of an Act of Congress, it assumes "'the gravest and most delicate duty that [it] is called on to perform'." *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980), *quoting Blodgett v. Holden*, 275 U.S. 142, 148 (1927). Even where the fundamental matters of federalism and state sovereignty are in play, and the case thus "calls for close examination" (*Fullilove, 448 U.S. at 472*), a court is "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution" (*ibid.*) to execute enumerated powers affecting the national interest. *See Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973); *Cleland v. National College of Business*, 435 U.S. 213 (1978). Because the judiciary is testing not merely "a choice made by a single judge or a school board, but ... a considered decision of the Congress and the President" (*Fullilove*, 448 U.S. at 473), the courts must accord "great weight" (*ibid.*) to legislative judgments.

Complementing this principle of deference is the venerable presumption that acts of Congress are constitutional. *FCC v. Beach Communications*, 113 S.Ct. 2096, 2102 (1993); *Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988). Thus, "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Concrete Pipe and Products of Calif., inc. v. Construction Laborers Pension Trust for S. Calif.*, 113 S.Ct. 2264, 2282 (1993); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830).

2. The Commerce Clause, Art. I, Sec. 8, cl. 3, is the direct source of perhaps the most important powers which the Federal Government exercises in peacetime. The determinative test of the exercise of this power is whether the activity sought to be regulated affects commerce "among the several States" and "has a real and substantial relation to the national interest." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255 (1964). Whether a statute proscribes an activity genuinely affecting commerce is, in the first instance, the judgment of Congress.

Legislative purpose or intent may be gleaned from findings formally incorporated into the statute. If Congress makes such findings, they carry substantial weight in a court's analysis. *Perez v. United States*, 402 U.S. 146, 156 (1971). However, Congress "need not make particularized findings" (*id.*) that a class of activity affects interstate commerce. If no formal findings accompany the legislation, other sources of legislative intent such as committee or conference reports, floor debates, Members' speeches, or hearings typically are reviewed in assessing whether the challenged activity has an interstate effect.

In certain instances, as in this case, there is a lack of express data as to the process and authority by which Congress ultimately adopted the legislation. Nevertheless, "[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Miller*, 333 U.S. 138, 144 (1948); *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18 (1983). "[B]ecause we never require a legislature to articulate its reasons for enacting a statute" (*Beach Communications*, 113 S.Ct. at 2102), Congress was not required to state explicitly that it was acting pursuant to the Commerce Clause when it enacted Section 922(q).

Regardless of the extent to which Congress has made specific findings, the pivotal inquiry in Commerce Clause analysis is whether the legislative act has "a rational basis." *Federal Energy Regulatory Com'n v. Mississippi*, 456 U.S. 742, 756 (1982). *See also Hodel v. Virginia Surface Mining & Recl. Assn., Inc.*, 452 U.S. 264, 277 (1981); *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981). As the Ninth Circuit put the point in *United States v. Edwards*, 13 F.3d 291 (1993), the courts consider whether a "reasonable Congress" could find that the class of activity regulated affects interstate commerce *(id.* at 295); that is, whether Congress properly could have found a sufficient nexus had it sought to do so. *See Perez v. United States*, 402 U.S. 146, 152-156 (1971). Courts may invalidate legislation enacted under the Commerce Clause *"only if* ... there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel v. Indiana*, 452 U.S. at 323 (emphasis added).

In this case, the Fifth Circuit acknowledged the scope of the Commerce power, and the principles of deference and presumption of constitutionality. *United States v. Lopez*, 2 F.3d 1342, 1360, 1364 (1993). Nevertheless, the court invalidated Section 922(q) because of the absence of "express or implied congressional findings" (*id.* at 1357) regarding the effect on interstate commerce of the acts proscribed by the statute, *i.e.*, the possession of a firearm within 1,000 feet of a public school. In the lower court's view, Congress had "not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause." *Id.* at 1365-66.

Notwithstanding this Court's pronouncements that express findings are not required to sustain an exercise of powers delegated to Congress in the Commerce Clause, the Fifth Circuit ruled that "[c]ourts cannot properly perform their duty to determine if there is any rational basis for a

congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding." *Id.*, 2 F.3d at 1363-64. The lower court reasoned, in effect, that the presumption of constitutionality attaching to Section 922(q) is fatally undermined in the absence of explicit congressional findings linking handgun possession to commerce.

3. The essential *fallacy* in the Fifth Circuit's argument is that this type of structure -- legislative action supported by legislative findings -- is crucial in order for a court to resolve a Commerce Clause challenge in favor of constitutionality. The presumption of constitutionality attaching to statutes persists regardless of the extent to which a specific interstate nexus is identified. As is illustrated well by the Fifth Circuit's survey of firearms legislation over the past fifty years (*Lopez*, 2 F.3d at 1348-1360), different pieces of legislation come packaged differently. The degree to which a statute is accompanied by explanatory findings of impact on commerce bears on the ease with which a reviewing court may uphold the statute, but it does not *eo ipso* affect the statute's constitutionality. This is the point of the Ninth Circuit's statement in *Edwards*, 13 F.3d at 295, that if Congress does make such findings, they carry "great weight" and the "reviewing court's responsibility to determine whether a reasonable Congress would have found such a nexus is simplified." *Ibid.* But this is not to say that if express or direct findings are absent, the statute's constitutionality is suspect.

For this reason, the rule of reasonableness invoked by the Ninth Circuit in *Edwards*, as that court implicitly recognized, is transitive: It applies whether or not formal findings of commercial impact accompany the legislation; whether other indicia of legislative reflection upon the point are found; or indeed, whether the statute and the "legislative history" are silent. In any of these scenarios the determi-

native question is one of rationality: Do extant findings have a rational basis, or, where there are no such findings, would a reasonable Congress find that the class of activity regulated affects interstate commerce? The reviewing court is thus tasked with "discern[ing] some legislative purpose or factual predicate that supports the exercise of that power" (*EEOC v. Wyoming*, 460 U.S. at 226 n. 18), were that exercise rationally undertaken. Or put differently, would Congress have ascertained a nexus with commerce had it explicitly addressed the question?

To see clearly the error of the Fifth Circuit's premise that the presence or absence of legislative findings affects constitutionality, one need only consider the analytical underpinning of such an approach. To hold that a statute is constitutional only when it is accompanied by explicit findings limits the statute's validity to what the legislators specifically had in mind when they enacted it. But legislators in drafting statutes may *not* have in mind all possible constitutional predicates or all possible applications of the law. Hence, "to apply the law only in ways the legislators actually thought of not only seems to be too restrictive, but may also result in less than what the legislators want these laws to achieve." W Lee, "Statutory Interpretation And The Counterfactual Test For Legislative Intention," 8 *Law And Philosophy* 383, 389 (1989). It is also possible, in a given case, that Congress may have been purposefully silent, for "'Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on commerce'." *Perez, supra*, 402 U.S. at 152, *citing United States v. Darby*, 312 U.S. 100, 120-21 (1941).

The approach followed by the Ninth Circuit in *Edwards* is more workable. A statute should be interpreted to accomplish what Congress would have done had it treated the question squarely. This is an objective approach to

congressional intent (what Congress is reasonably likely to have done) not limited to what legislators actually thought. "The search is for manifested meaning -- not unmanifested intent." R. Keeton, JUDGING 150 (1990). In other words, a "court should "[d]efer to the statute's manifestations of principle and policy, as far as they can be ascertained." *Id.* at 151. *See also*, F. Easterbrook, "Text, History, And Structure In Statutory Interpretation," 17 *Harv. J. Law & Pub. Policy* 61-64 (1994)("We use our knowledge of the times in which texts were written to deduce purposes, goals, objectives, and values of the drafters."); *and* R. Dworkin, LAW'S EMPIRE 217, 219, 314 (1986).

In this sense, the analysis is no different from rational-basis review in other contexts. Because a legislature is not required to articulate its reasons for enacting a statute, "it is entirely irrelevant for constitutional purposes whether the conceived [rationale] ... actually motivated the legislature." *Beach Communications*, 113 S.Ct. at 2102. Thus, "the absence of 'legislative facts on the record' has no significance in rational-basis analysis." *Ibid.* This is a fundamentally pragmatic consideration: "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Ibid.* (*quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973).

Accordingly, contrary to the Fifth Circuit's theory, the lack of direct or explicit findings in Section 922(q) does not render the statute constitutionally deficient, so long as a reasonable basis for a nexus between the proscribed conduct and commerce can be discerned.

II. THERE IS A REASONABLE BASIS FOR FINDING A CAUSAL NEXUS BETWEEN THE CONDUCT PROSCRIBED IN SECTION 922(q) AND INTERSTATE COMMERCE.

1. Little divination is required to recognize that Congress in this case invoked its Commerce power in order to cope with a current condition of enormous federal consequence. Handgun violence is taking a ghastly toll on American society. In 1991 alone, over 24,000 people were murdered in the United States, principally by means of handguns. Our country has been characterized as "the only modern industrial urban nation that persists in maintaining its gun culture." M. Boser, "An Analysis Of Washington, D.C.'s Assault Weapon Manufacturing Strict Liability Act," 25 *Colum. J. L. & Soc. Probs.* 313 (1992). And the problem is burgeoning. Between 1960 and 1980, the death rate from homicide by firearms increased 160 percent, corresponding directly to the simultaneous growth in gun ownership. Increased firearm possession leads to more homicides for the simple reason that "firearms make death a more likely consequence of violence." *Ibid.* In short, Section 922(q) is a legislative response to a virtual epidemic. The matter thus "has a real and substantial relation to the national interest" (*Heart of Atlanta Motel*, 379 U.S. at 255), as required for "rational-basis" analysis to proceed.

This state of affairs provides the obvious frame of reference in which to test the rational basis of the proposition that Congress meant to act pursuant to the Commerce power in legislating Section 922(q) and that its action was lawful. In such a context -- where the cumulative effects of widespread firearms violence, the public welfare, and our national economy are facets of American society so complexly interconnected -- we could well expect a "reasonable Congress" (*Edwards*, 13 F.3d at 295) to respond with legislation

the likes of Section 922(q). Framing the analysis this way provides a coherent fit between an identified evil and the congressionally-fashioned response to it. As demonstrated in Section I, *supra*, the fact that this legislation may not have been associated with express findings of an impact on commerce does not, in any way, disturb this fit.

The rational basis of the legislative response in this case is solidified further because there have been ample findings made over time by Congress concerning the impact of firearms on the national economy -- findings the Fifth Circuit traced meticulously in its opinion. *See Lopez*, 2 F.3d at 1348-1360. This long-term institutional reflection upon the national effects of firearms abuse provides "a predicate that supports the exercise" of the Commerce power. *EEOC v. Wyoming*, 460 U.S. at 226 n. 18.

In this connection, Justice Powell's observation in *Fullilove, supra*, has particular pertinence: "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Id.*, 448 U.S. at 503 (Powell, J., concurring). Because Congress has frequently relied upon the Commerce Clause as authority for the enactment of statutes regulating the use and possession of firearms, it "was not required to conduct additional hearings and make new findings which would merely repeat its prior findings concerning the detrimental effect of firearms." *Edwards*, 13 F.3d at 294. Rather, the legislature's statutory response here is an appropriate resolution of what Congress has, for decades, deemed to be a national problem of the first order. *Cf. Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) ("The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, is not, given the

evidence as to the effect of such practices on other aspects of commerce, a crucial matter.")

2. Nor is the lower court's concern with the local nature of the proscribed conduct valid. The denomination of an activity as "local" or "intrastate" does not in itself resolve the question whether Congress may regulate it under the Commerce Clause. The commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). *See also Fry v. United States*, 421 U.S. 542, 547 (1975); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)

This conclusion is strengthened by prior Supreme Court decisions which upheld legislation enacted pursuant to the Commerce Clause designed to regulate purely intrastate activities which affect interstate commerce. *See, e.g., Wrightwood Dairy Co.*, 315 U.S. at 118-19 (Congress is permitted to regulate the price of milk sold intrastate because of resulting competitive effect upon milk sold interstate); *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942) (Congress is permitted to regulate home grown wheat consumption because of its effect on interstate commerce); *Huddleston v. United States*, 415 U.S. 814, 833 (1974) (Congress is permitted to regulate intrastate redemption of firearms from pawnshops on the basis that such transactions affect interstate commerce).

Accordingly, it is reasonable to conclude that the violence created through the possession of firearms adversely affects the national economy, notwithstanding the local nature of the activity in the particular case. As this Court has said,

"[t]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, ... which might have a substantial and harmful effect upon that commerce." *Heart of Atlanta Motel*, 379 U.S. at 258. Therefore, Congress acted reasonably to regulate the possession of firearms pursuant to the Commerce Clause in enacting Section 922(q). Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1981).

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed.

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